IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 15, 2006 Session

STATE OF TENNESSEE v. BRETT RYAN DUBOSE

Direct Appeal from the Criminal Court for Hamblen County
No. 04CR436 James E. Beckner, Judge

No. E2005-02167-CCA-R3-CD - Filed October 16, 2006

The defendant, Brett Ryan Dubose, was convicted of DUI, assault, and resisting arrest and sentenced to an effective sentence of eleven months, twenty-nine days to be served at 10%. In addition, his driver's license was suspended for one year and he was fined a total of $2000. On appeal, he argues that the trial court erred: (1) in denying his motion to dismiss the indictment; (2) in denying his motion to suppress and finding that the arresting officer had probable cause to stop the defendant; (3) in denying his motion for a mistrial based upon a word used in the prosecutor's opening statement; (4) by not instructing the jury on the defenses of involuntary intoxication, entrapment, and self-defense; (5) in denying his motion to redact portions of the videotape entered into evidence; and (6) in denying his request to cross-examine the arresting officer about his prior testimony. Additionally, he argues: (7) the evidence was insufficient to support his convictions; and (8) the cumulative effect of the errors denied his rights to due process and a fair trial. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., joined. GARY R. WADE, P.J., Not Participating.

Paul Whetstone, Morristown, Tennessee, for the appellant, Brett Ryan Dubose.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Victor J. Vaughn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On March 7, 2005, the Hamblen County Grand Jury returned a seven-count indictment charging the defendant with DUI, violation of the implied consent law, possession of a Schedule III

controlled substance (Dihydrocodeinone), possession of drug paraphernalia, resisting arrest, Class B misdemeanor assault, and retaliation for past action. The trial court subsequently dismissed the charges for violation of implied consent law, possession of a Schedule III controlled substance, possession of drug paraphernalia, and retaliation for past action, and, following a jury trial, the defendant was convicted of the DUI, resisting arrest, and assault charges. The trial court sentenced him to concurrent terms of eleven months, twenty-nine days for the DUI conviction, six months for resisting arrest, and six months for assault, all suspended except for 10%.

Suppression Hearing

At the June 30, 2005, suppression hearing, Officer Jason Young of the Morristown Police Department testified that on September 26, 2004, he stopped the defendant on Highway 160 because the defendant was driving "all over the road." He explained that the defendant was "swerving" and "going off the road and then coming back on" and said he followed the defendant for about one-quarter of a mile before stopping him. Officer Young said that although the video camera in his patrol car automatically came on when he activated his emergency equipment, he could also start the camera manually but did not do so while following the defendant because he "didn't think about it." Officer Young administered field sobriety tests on which the defendant performed "okay" on the finger count test but failed the walk and turn and the one-leg stand tests. On the walk and turn test, the defendant "missed quite a few steps" and fell against his car; on the one-leg stand test, he almost fell into the road. Officer Young acknowledged that the defendant told him he had a problem with one of his feet.

Officer Young said he advised the defendant he was under arrest and tried to handcuff him, but the defendant pulled away. He said it took him and another officer "several, several minutes" to handcuff the defendant "because he was fighting us so hard." Officer Young denied that he pepper-sprayed the defendant but acknowledged that, on the videotape, he said he had to clean his hands because he had pepper spray on them. He said the defendant agreed to take a breathalyzer test, but he did not administer one because the defendant was fighting and spitting on him. A search of the defendant's person revealed a plastic bag containing two pills, and a search of his vehicle revealed a cold, open container under the driver's seat, a pipe containing what appeared to be marijuana residue, and a marijuana seed. Officer Young said the defendant threatened to kill him while he was in the back of the patrol car.

Kathryn Deardorff testified that on September 26, 2004, she and the defendant went to a ball game in Knoxville and then to a friend's house in Fountain City, after which the defendant drove her home, arriving around 11:50 p.m. She said the defendant appeared to be "perfectly fine" and did not drive "all over the road." She said the defendant consumed "maybe two beers" before the ball game and denied seeing any beer in the defendant's car on the way home.

Kevin Dubose, the defendant's father, testified that he had watched the videotape with defense counsel and that there were gaps of time on the tape where it had been turned on and off. Asked if the person he heard "wailing and screaming and cursing and spitting" on the tape was his

son, Dubose replied, "I've never heard him or seen him act like that before, ever. It's not the Brett that I know."

At the conclusion of the hearing, the trial court denied the defendant's motion to suppress, finding that Officer Young had reasonable suspicion to stop the defendant, and dismissed the retaliation for past action count of the indictment.

Trial

State's Proof

In addition to testifying as he had at the suppression hearing, Officer Young said that when he activated his blue lights, the defendant "jerked his car off the road at a . . . very rapid pace." He said that his video camera came on automatically "a few seconds" after he activated his emergency equipment. Officer Brian Sulfridge arrived on the scene as Young was administering the first field sobriety test to the defendant, and all of the tests were recorded via the video camera in Young's patrol car. Young said he detected the odor of alcohol on the defendant's person, and the defendant initially told him that he had not had anything to drink and then later told him he had had "a few to drink," but it had been "a while" ago. Officer Young discovered an open container of beer, "which was still halfway full and cold," under the defendant's seat. As Young was escorting the defendant to his patrol car, the defendant became "real combative" and pulled away, causing the officers and the defendant to fall to the ground. After several unsuccessful attempts to handcuff the defendant, Officer Sulfridge pepper-sprayed him once and then sprayed him again because he "continued to fight and was very aggressive." After the officers managed to get the defendant in the patrol car, he started "screaming and yelling and spitting and cussing and everything else." Officer Young said he turned his video camera off and did not anticipate turning it back on but did so while transporting the defendant to the jail because the defendant kept spitting on him.

During Officer Young's testimony, the videotape of the incident was played for the jury. On the tape, the defendant first told Young that he had not had anything to drink and then later admitted he was drinking before the football game but said he stopped between 6:00 and 6:30 p.m. As Officer Young was attempting to handcuff the defendant behind his back, the defendant said, "You hit my head. . . . You choked me and hit my head. . . . I will take you to Court, you son of a bitch!" En route to the jail, the defendant repeatedly called Officer Young a "faggot" and told him, "I'll kill you. I'll rip your fucking throat out with my bare fucking hands." Additionally, he was spitting on Officer Young's back during the trip.

On cross-examination, Officer Young acknowledged that he made a mistake on the defendant's warrant when he noted that the defendant refused to take a breathalyzer test. He said he observed the defendant speeding but did not use a radar although his citation reflected that the defendant was traveling 70 miles per hour in a 55-miles-per-hour speed zone. He denied hitting or choking the defendant. He acknowledged that he asked Officer Sulfridge if the video camera in his

patrol car had been activated.[1] He said he told the defendant he was going to take him to a hospital to submit a blood sample but did not do so because the defendant started spitting on him. Shown photographs depicting injuries to the defendant,[2] Officer Young said the defendant did not appear that way when he left him at the jail.

Officer Brian Sulfridge of the Morristown Police Department testified that when he arrived on the scene to assist Officer Young, the defendant was performing the one-leg stand test. He said the defendant "indicated intoxication based on that test," explaining that the defendant lost his footing, "had to be caught by Officer Young," and "kept swaying." On the walk and turn test, the defendant swayed his arms and "almost fell and caught himself on his car." It was Officer Sulfridge's opinion that the defendant was under the influence and that his ability to drive was impaired. Officer Sulfridge said the defendant resisted when they tried to handcuff him, and the officers "fell to the ground with the defendant on his stomach." As the defendant tried to roll over, Officer Sulfridge pepper-sprayed him in an effort to subdue him and then sprayed him again because he did not calm down. The officers were then able to handcuff the defendant. Officer Sulfridge denied striking or choking the defendant and said they had to "forcibly" put him into the backseat of the patrol car. He said the defendant was "[v]ery irrational. He kept kicking at the back window, he kept screaming, and kept kicking and throwing himself around in the backseat."

On cross-examination, Officer Sulfridge acknowledged that the defendant consented to take a breathalyzer test and that the machine was located at the police department, but Officer Young took the defendant directly to the county jail. He acknowledged that he had a video camera in his patrol car and when asked if he had activated his emergency equipment, he said, "If I turned my equipment on, I turned my camera off, or I don't know if I turned my equipment on or not." He said he could have manually turned on his camera but did not do so because Officer Young's camera was activated.

Corrections Officer Greg Johnson of the Hamblen County Sheriff's Department testified that he was outside the jail when Officer Young arrived with the defendant who was "yelling and screaming" and appeared to be intoxicated. Because the defendant refused to stand up, Officer Johnson placed his arm underneath the defendant's arm and "picked him up" to escort him to the door. As Officer Johnson put the defendant's chest against the wall "to hold him there" so he could open the door with his other hand, the defendant started kicking him. Johnson then "put [the defendant] down on the ground," and other officers came outside to assist him. Inside the jail, the defendant spat at Johnson and two other officers, after which he was pepper-sprayed. Johnson said the defendant began "screaming and squirming" and was placed in a holding cell where he beat his head and arms against the door until around 4:30 a.m.[3] As a result of the defendant's behavior, Officer Johnson could not complete the booking process until he returned to work at 5:00 p.m. the

[1]On the videotape, Officer Sulfridge told Young he had turned his video camera off.

[2]The photographs show bruising to the defendant's face and right eye, left arm, neck, and abdomen.

[3]Officer Johnson testified that his shift ended at 5:00 a.m.

following day. When Officer Johnson removed the defendant from the cell the following day, the defendant was a "[c]omplete[ly] different person[,] [v]ery apologetic. . . . He told me that he had drank twelve beers that night and took some Hydros and that he acted crazy and was very sorry." Officer Johnson said the defendant's eyes were red, which he attributed to the pepper spray. On cross-examination, Officer Johnson said another corrections officer "could have" shot the defendant with a paintball gun. Shown a photograph of the defendant's injuries, Officer Johnson acknowledged that it was an accurate depiction of the defendant's appearance when he was released from the jail.

Defense Proof

Eric Clevenger, a lab technician employed by the Lakeway Regional Hospital, testified that he performed a urine drug screen on the defendant on September 27, 2004, the results of which were negative for opiates but positive for marijuana and Benzodiazepine, a mild sedative.

Kathryn Deardorff testified that she went with the defendant to the football game in Knoxville, arriving at about 6:30 p.m. She said the defendant consumed "two beers at the most" before the game but did not drink anything else that night. She said the defendant took her home around midnight.

Erin Siegler testified that he and his girlfriend went to the ball game with the defendant and Deardorff and that the defendant drank one beer prior to the game. He said the group left the game together during the early part of the third quarter and went to his house in Fountain City. He denied that the defendant had anything to drink at his house and said the defendant left at about 11:30 p.m.

Zak Hamilton testified that he saw the defendant at Siegler's house around 10:00 or 10:30 p.m. He denied that anyone consumed alcohol at Siegler's house and said the defendant did not appear to be under the influence of anything.

The twenty-two-year-old defendant testified that he had been undergoing treatment for depression since the age of sixteen and was taking Paxil at the time of his arrest. He denied that he was under the influence of an intoxicant on the night of his arrest. He identified photographs depicting his injuries and said that he was shot in the stomach with a paintball gun and kicked in the side while confined at the Hamblen County Jail. He said that the injury to his eye was the result of Officer Young "smash[ing] [his] eye socket into the pavement." The defendant admitted that he had smoked marijuana and taken "a mild sedative for nerve problems" about two days before his arrest but said he had not ingested any drugs during the six hours prior to his stop. He admitted that he drank two beers before the football game and said the group left the game during the third quarter and went to Siegler's house where he stayed for about an hour before driving Deardorff home. He denied that he had anything to drink at Siegler's.

The defendant also identified a photograph of his right foot depicting a surgical scar and said he underwent surgery in 2002 and still had problems with that foot. He said he stood on his right

foot during the field sobriety test which affected his ability to perform the test. He said that he agreed to take a breathalyzer test because he wanted to prove his innocence and that Officer Young told him he would be arrested for DUI if he did not take the test. However, Officer Young did not allow him to take the test. He said that Officer Sulfridge pepper-sprayed him as soon as his face hit the ground and described the effects of the pepper spray as "[u]nimaginably unbearable," which caused him to "los[e] control." The defendant said he was pepper-sprayed approximately five times, the first two by Officer Sulfridge and the remaining by Officer Young. He said that Officer Young continued to spray him en route to the jail and that the pain caused by the pepper spray made him scream and wail.[4] He denied telling Corrections Officer Johnson that he had consumed twelve beers and a Hydrocodone pill but acknowledged that Officer Young found an open beer in his car.

Kevin Dubose, the defendant's father, testified that the defendant had experienced anxiety and depression problems for a few years. When he picked the defendant up from the jail the following day, the defendant had a "beat up face" and had been confined for about twenty-two hours. He took his son to the hospital for drug tests "to prove that he wasn't on anything" and to have photographs taken.

Nick Hamilton testified that he had known the defendant since birth and that his son and the defendant were close friends. He said the defendant had never told him a lie.

ANALYSIS

I. Motion to Dismiss

The defendant argues that the trial court erred in denying his motion to dismiss based upon Ferguson violations, see State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), saying that Officers Young and Sulfridge manipulated their video equipment and that Young had "a duty to preserve the image of the [d]efendant driving 'absolutely all over the road.'" The State contends that the defendant failed to prove that the State lost or destroyed any evidence.

In Ferguson, our supreme court adopted a balancing approach for courts to use to determine when the loss or destruction of evidence has deprived a defendant of his fundamental right to a fair trial. Id. at 917. Under this approach, the first step is to determine whether the State had a duty to preserve the evidence. As a general rule, "the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. (footnote omitted). If the proof shows that the State had a duty to preserve the evidence, and that the State failed in its duty, the court must then consider the following factors which bear upon the consequences of the State's breach of its duty: (1) the degree of negligence involved; (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used to support the conviction. Id. If the court concludes, after consideration of all the factors, that

[4] On the videotape, the defendant repeatedly screamed and shouted obscenities at Officer Young.

a trial without the missing evidence would not be fundamentally fair, the court has the option of dismissing the charges against the defendant, issuing a special jury instruction on the significance of the missing evidence, or taking any other steps necessary to ensure a fair trial. Id.

The defendant argues that Officer Young's failure to videotape the defendant's erratic driving "destroyed" this key evidence. This claim presupposes that Officer Young had a legal responsibility to videotape the defendant's vehicle as proof of his driving "absolutely all over the road," and the fact that he did not do so must result in suppression of evidence obtained as the result of the stop of the vehicle. We respectfully disagree with the defendant's view that the holding in Ferguson imposes such a duty on police officers. This claim is without merit.

II. Motion to Suppress

The defendant next argues that the trial court erred in denying his motion to suppress the evidence and asks this court to "consider the effect of the destruction of the evidence with special emphasis on the impact it made in terms of the Motion to Suppress based upon an alleged illegal seizure of the person of [the defendant]." The State argues there was no proof that any evidence was destroyed and the trial court properly determined that Officer Young had probable cause to stop the defendant.

When this court reviews a trial court's ruling on a motion to suppress evidence, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Moreover, the party prevailing at the suppression hearing is afforded the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998). Thus, the findings of a trial court in a suppression hearing are upheld unless the evidence preponderates against those findings. See id. However, the application of the law to the facts found by the trial court is a question of law and is reviewed *de novo*. See State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

In Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968), the United States Supreme Court held that a law enforcement officer may conduct a brief, investigatory stop of an individual if the officer has a reasonable suspicion, based on specific and articulable facts, of criminal activity on the part of the individual. Under the Terry rationale, an officer may stop and detain a vehicle based on the reasonable suspicion that one of its occupants is either engaged in, or about to be engaged in, criminal activity. Ornelas v. United States, 517 U.S. 690, 693, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996); State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998); State v. Vineyard, 958 S.W.2d 730, 734 (Tenn. 1997). Reasonable suspicion is an objective standard and must be determined from the totality of the circumstances. United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981); Ornelas, 517 U.S. at 696, 116 S. Ct. at 1661-62. "Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Cortez, 449 U.S. at 417-18, 101 S. Ct. at 695. Reasonable suspicion will be found to exist only when "the events

which occurred leading up to the stop" would cause an "objectively reasonable police officer" to suspect criminal activity on the part of the individual stopped. Ornelas, 517 U.S. at 696, 116 S. Ct. at 1661-62.

At the conclusion of the pretrial hearing, the trial court denied the defendant's motion to suppress:

> Now, all I have here today . . . is the uncontradicted testimony of the officer. What Terry versus Ohio requires is not a finding by the Court but the ability of the officer to articulate reasonable suspicion of criminal activity. Officer Young has without any question articulated reasonable suspicion of criminal activity when he says that the defendant was driving recklessly and that's the reason he turned around and went back to stop him.
>
> The questions of why a camera wasn't on and things of that nature are matters for a jury to have to decide. A trier of fact could not – They don't rise to questions of law or even to the status of rebutting an issue of law. So without any question when Officer Young stopped [the defendant] he had the right under Terry versus Ohio and all the many cases that have followed that to stop him and temporarily, at least, seize his person.
>
> Then what happened after that, put with that, he articulates he smelled alcohol on the defendant's breath. He gave him field sobriety tests which he says he failed, and the defendant's conduct to [sic] himself with his speech up to the time that he was arrested and searched and the video corroborates the opinion of the officer that he had probable cause to arrest the defendant at that time and probable cause to search him. He certainly could've searched him and patted him down. Under Terry versus Ohio, he could've patted him for weapons at the time of the stop but under probable cause, which goes beyond Terry versus Ohio, . . . he had a right to search him for weapons and search him for contraband, that is, things that would show why he may have been under the influence, driving under the influence. And that led to a finding of a Hydrocodone pill and a cold – according to the testimony, a cold, open beer under the driver's seat.
>
> Without any question, up to that point, everything was legally, constitutionally, fairly, properly done.

As we understand the defendant's argument, he asks that we consider the trial court's credibility findings in view of the alleged destruction of evidence which was the basis for the previous issue. As we have set out, that claim is without merit. Likewise, we conclude that the trial court's credibility findings as to the defendant's erratic driving which triggered the stop of his vehicle are supported by the record. Accordingly, this claim is without merit.

III. Motion for Mistrial

The defendant argues that the trial court erred in denying his motion for a mistrial as a result of the prosecutor's opening statement which included the term "B.S.", saying that the "vitriolic stench that emanated from its verbal deposit in the middle of the Hamblen County criminal courtroom on July 13, 2005 permeated the atmosphere, and very effectively soiled the due process rights that were otherwise awaiting the [defendant]." The State argues that the issue has been waived because defense counsel failed to object until after making his opening statement during which he used the same word sixteen times.

Whether to grant a mistrial lies within the sound discretion of the trial court, and we will not disturb the court's decision in this regard absent a clear showing of abuse of discretion. State v. Land, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000) (citations omitted). A mistrial should be declared in a criminal case only when something has occurred that would prevent an impartial verdict, thereby resulting in a miscarriage of justice if a mistrial is not declared. See id. (citing State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994)); State v. Jones, 15 S.W.3d 880, 893 (Tenn. Crim. App. 1999) (citing Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977)). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (quoting Arnold, 563 S.W.2d at 794). The burden to show the necessity for a mistrial falls upon the party seeking the mistrial. Land, 34 S.W.3d at 527 (citing State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)).

The portion of the State's opening statement of which the defendant complains came at the closing when the prosecutor said: "Don't let them divert your attention from the issues in this case. There's an old saying. When you can't dazzle them with brilliance, baffle them with B.S. And that's what they're going to try to do." Instead of contemporaneously objecting to the prosecutor's statement, defense counsel began his opening statement by saying, "I'll try not to B.S. you folks here on my opening statement. I don't think I'll have any trouble doing that. B.S., we know what that stands for." Defense counsel then used the term fourteen additional times, making statements including: "He had no Hydrocodone in his system. None whatsoever. So who's B.S.'ing? . . . This is not a fancy expert that somebody has brought into Court in order to try to B.S. you, as the Attorney General says. . . . This case involves videotape. I don't think that's B.S. . . . B.S. Video is not B.S. But I'll tell you what is. Video is B.S. if you pick and choose what portions of the video image you want to preserve by pushing a button and then by muting an audio button or muting a video button and blocking out other parts. . . . [Officer Young] chooses when to turn it off for six minutes, and he chooses when to turn it back on. Now, that's B.S. That's B.S. And he will attempt to fill in those blank spaces with whatever he tends to say. That'll be B.S."

In a jury-out hearing after he had completed his opening statement, defense counsel moved for a mistrial, saying, "The Attorney General just accused me of B.S., which we know what that means. I've never heard that said in an opening statement. And that's pretty rough, and I think that's over the line." The trial court denied the motion, concluding: "I think the statements of both sides

were within the bounds of permissible argument under today's standards, more liberal standards of today. And nothing improper was done, so I do not believe that a mistrial should be granted for those reasons."

We conclude that the trial court did not err in refusing to grant a mistrial because of the State's single use of the word "B.S." during its opening statement. Without seeking timely court action because of the use of this word, the defendant proceeded with his own opening statement, using the word "B.S." sixteen times, by our count, before asking for a mistrial. Under these circumstances, there was not a "manifest necessity" requiring a mistrial.

IV. Jury Instructions as to Involuntary Intoxication, Entrapment, and Self-Defense

The defendant next argues that the trial court erred by not allowing him "to rely upon the defense of involuntary intoxication as the result of being sprayed mercilessly with pepper spray," as well as the defenses of entrapment and self-defense to the charges of assault and resisting arrest. The State contends that the evidence did not support jury instructions as to these defenses.

Defendants have a "constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). As long as the instructions given are correct statements of the law and "fully and fairly set forth the applicable law," the trial court does not commit error in "refus[ing] to give a special instruction requested by a party." State v. Bohanan, 745 S.W.2d 892, 897 (Tenn. Crim. App. 1987). Furthermore, there is no requirement that a trial court be limited to using pattern jury instructions. State v. West, 844 S.W.2d 144, 151 (Tenn. 1992). When reviewing challenged jury instructions, we must look at "the charge as a whole in determining whether prejudicial error has been committed." In re Estate of Elam, 738 S.W.2d 169, 174 (Tenn. 1987); see also State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994).

In our review of this issue, we first will consider the defendant's claims as to an instruction for involuntary intoxication. The defense of involuntary intoxication is codified at Tennessee Code Annotated section 39-11-503(c):

> Intoxication itself does not constitute a mental disease or defect within the meaning of § 39-11-501. However, involuntary intoxication is a defense to prosecution if, as a result of the involuntary intoxication, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law allegedly violated.

Intoxication is defined as a "disturbance of mental or physical capacity resulting from the introduction of any substance into the body." Tenn. Code Ann. § 39-11-503(d)(1).

Prior to trial, the defendant filed a "Supplement to Notice to Rely Upon Mental Health Defenses and Motion for Declaratory Order in Connection Thereto," stating that he intended to "rely upon the fact that his eyes were repeatedly sprayed with the chemical agent, known as 'pepper spray', and that as a result, he and [sic] mental and physical disturbance which relieved him of criminal responsibility." In denying the motion, the trial court determined:

> No Court, I don't believe, would ever hold that pepper spray would be a basis for a charge to the jury of involuntary intoxication. Certainly, . . . it's arguable to the jury that that's the reason the defendant was acting the way he was and not because he was otherwise intoxicated. Those things are reasonable arguments to the jury and can be made to the jury.

As for evidence of intoxication, Officer Young testified at trial that he detected the odor of alcohol on the defendant's person and discovered a cold, open container of beer under the driver's seat of the defendant's vehicle. The defendant failed two field sobriety tests. Additionally, he told Corrections Officer Johnson that he had drunk twelve beers the night of his arrest.

Though no witness testified as to the physiological effects of pepper spray, the defendant argues on appeal that its use "introduc[ed] . . . pepper spray into the bloodstream of the [defendant], through the peripheral tissues surrounding his eyes." However, there is no proof in the record, expert or otherwise, that pepper spray does other than remain on the body surface upon which it was sprayed. Thus, the defendant cannot show that spraying "introduce[d]" the "substance into the body," as required by Tennessee Code Annotated section 39-11-503(d)(1). Likewise, there is no basis in the record for the defendant's claim that, once in the bloodstream, pepper spray causes intoxication because, to result in involuntary intoxication, a "person [must] lack[] substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law allegedly violated." Tenn. Code Ann. § 39-11-503(c). This assignment is without merit.

The defendant also argues that the trial court erred by refusing to allow him to rely upon the defenses of entrapment and self-defense as to the assault and resisting arrest charges. The State argues that the defendant has waived this issue because he failed to have the trial court rule on his notices of intent to rely on these defenses and failed to request any special jury instructions or object to the instructions given by the trial court. We note that the defendant makes no references to the record as to when this refusal occurred.

Given the nature of the State's objections, we will trace this matter through the trial process. On March 31, 2005, the defendant filed a notice that he intended to rely on a defense of insanity as to the charge of retaliation for past action and "temporary insanity and/or self defense" as to the charges of resisting arrest and assault. On June 28, 2005, he filed a notice of his intent to rely upon an entrapment defense as to the charges of retaliation for past action, resisting arrest, and assault. During a lengthy hearing on June 30, 2005, defense counsel stated that "[t]he motion for entrapment defense, we think it's supported under the plain language of the law and the statutes as is involuntary

intoxication." At the hearing, the court was not asked to rule on whether he could rely upon these defenses, and the defendant did not ask during the trial that the jury be instructed as to either. However, in his motion for new trial, the defendant complained that "[t]he Trial Court erred in refusing to allow the Defendant to rely upon the Defense of Entrapment in order to defend against the charges/convictions of Assault and Resisting Arrest."

In a nutshell, this issue is whether a defendant may rely upon pretrial notice of defenses, not mention these defenses at trial, argue they have been fairly raised and point to applicable proof, or ask that the court instruct as to the defenses. We conclude that the defendant failed to establish that these defenses were fairly raised at trial and, thus, that the court should have instructed as to each. See State v. Blackmon, 78 S.W.3d 322, 331 (Tenn. Crim. App. 2001).[5]

V. Motion to Redact Portions of Videotape

The defendant argues that the trial court erred in denying his motion to redact audio portions of the videotape showing the defendant cursing and spitting on the arresting officer, saying that the probative value was substantially outweighed by the danger of unfair prejudice. The State contends that the entire videotape was relevant to prove the elements of the offenses of which the defendant was convicted.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Prior to trial, the defendant filed a motion in limine seeking, *inter alia*, to have the videotape muted "to prevent the jury from hearing the profanity uttered by the [d]efendant." At the pretrial motions hearing, the trial court determined:

> [A]ll the events that did occur, whatever they are, from the time that [the defendant] was arrested until the time he was taken to the jail and his conduct in the police car, are all part of the offense; they're inseparable, and they are admissible, and it's not an issue of not being fair about spitting on a police officer and things like that. It's just, if that's what happened, then it's admissible in the case. It is in any case; it always has been and always will be.

The admissibility of evidence generally lies within the sound discretion of the trial court. State v. Edison, 9 S.W.3d 75, 77 (Tenn. 1999); State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997).

[5] It is difficult to envision how the defendant's spitting on Officer Young's back, which was the basis for the assault charge, was done in self-defense.

The trial court is accorded wide latitude in its decisions on the admissibility of evidence. Stinnett, 958 S.W.2d at 331; Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 702 (Tenn. Ct. App. 1999). The trial court's decision to allow or disallow evidence will not be overturned on appeal absent a showing that it has abused its broad discretion. Overstreet, 4 S.W.3d at 702; State v. Robinson, 930 S.W.2d 78, 84 (Tenn. Crim. App. 1995). We review this issue, therefore, under an abuse of discretion standard.

The videotape showed that, as the defendant was being transported to jail, he repeatedly threatened to kill Officer Young and called him a "faggot," punctuating these remarks with occasional loud screams. It does not show that Officer Young pepper-sprayed him, as the defendant claims. However, on at least once occasion, Officer Young asked that the defendant stop "spitting" on him. This behavior was the basis for the indictment for assault. Given this, and the widely conflicting testimony of Officer Young and the defendant as to various matters such as the number of times the defendant was pepper-sprayed and his behavior while in custody, we conclude that the record supports the decision of the trial court to allow the jury to view this videotape with the audio intact.

VI. Cross-Examination of Arresting Officer

On appeal, the defendant argues that the trial court twice mistakenly prevented his cross-examination of Officer Jason Young. According to the defendant's brief, the first of these mistakes occurred when counsel "attempt[ed] to cross-examine Young by comparing the charges cooly returned by a Grand Jury, with those he swore under oath on the night of the arrest." This matter arose at trial as Officer Young was cross-examined by defense counsel apparently about the affidavit of complaint:

> Q That is a statement you made under oath?
>
> A Yes. Yes.
>
> Q You appeared in a preliminary hearing and you likewise acknowledged that that was the truth. Do you want me to read that to you?
>
> A No. I remember that.
>
> Q Okay. Now, subsequent to that time, you appeared, did you not, in the Grand Jury room across the hall. Did you?
>
> A Yes.
>
> Q You raised your right [sic] at that time, did you not?
>
> A Yes.

Q And you swore, likewise, that you'd tell the truth.

A Yes.

Q Based upon those statements and your testimony, Officer Jason Young, prosecutor, testified on March 7, 2005, the grand jury found that [the defendant] violated the implied consent law by refusing to take blood for alcohol content test after being placed under arrest and advising of having been requested by law enforcement officers to do such test. That wasn't true.

A I made a mistake on the warrant. That's correct.

Q The warrant wasn't true. You acknowledge that –

THE COURT: You can't ask about testimony in the grand jury.

[DEFENSE COUNSEL]: If the Court please, can I not ask him if he lied in the Grand Jury room?

THE COURT: You can't ask anything about it because it's secret and you'll get yourself in trouble if you do that.

As we understand, counsel's last question was whether Officer Young acknowledged that he had made a mistake in the warrant, which we understand he agreed he had done. In the motion for new trial, the defendant complained about this exchange by asserting that the court erred "by refusing to allow him to refer to the grand jury's action in comparison to the charges to which he swore in his affidavit." On appeal, the defendant argues that we should reverse the trial court's limitation on grand jury testimony and "allow counsel to cross-examine Officer Young . . . [about] the fact that he originally 'loaded up' the [defendant] with a ridiculous array of charges." We do not read the transcript as the court's disallowing the defendant's attempting to question Officer Young about a "loading up" of charges. Since the trial court did not disallow a specific question, we are left to speculate as to exactly what the defendant wanted to ask Officer Young. In fact, it seems clear from his testimony that he acknowledged making a mistake in the warrant. Thus, we conclude that this claim is without merit.

As the second part of this issue, the defendant complains that the trial court erred by preventing his cross-examining Officer Young "using his prior testimony from the preliminary hearing." This issue arose during the following exchange:

Q I asked you during the course of the preliminary hearing: Officer Young, you didn't say how many sprayed [the defendant].

You answer[ed]: I sprayed him – well, actually, Officer Sulfridge sprayed him twice because I had one of his arms under control at the time and Officer Sulfridge sprayed him once.

Do you remember saying that?

A I do not.

A Okay. Would [you] like to read this, please?

THE COURT: You would have to –

[THE STATE]: I object. I'm not sure it's been authenticated, number one.

[DEFENSE COUNSEL]: It has been filed in the Court file.

THE COURT: The court [r]eporter . . . has to, if he denies it, then you'd have to bring the court reporter in that transcribed it.

[DEFENSE COUNSEL]: That's fine. I'd like to give him a chance to deny it first, please, sir.

THE COURT: Well, I thought he had.

[DEFENSE COUNSEL]: Well, I'd like him to take a look at it to see if it refreshes his recollection –

THE COURT: Well, if he didn't do it why would it – If he didn't make the transcript, why would it?

[DEFENSE COUNSEL]: Okay, well, that's fine. May I let the jury know that the transcript in this case says that?

THE COURT: You would have to have somebody to authenticate the transcript.

Q You did not testify at a preliminary hearing: I sprayed him, well, actually, Officer Sulfridge sprayed him twice because I had one of his arms under control at the time and Officer Sulfridge sprayed him once.

Do you deny making that statement?

A I do not remember. I do know Officer Sulfridge sprayed him twice, not once, and I did not spray him.

As we understand this interchange, Officer Young said that he did not recall making a statement which, according to defense counsel, was contained in the transcript. Defense counsel then asked the trial court to "let the jury know that the transcript in this case says" as counsel had read Young's statement. However, the court declined to do so, advising counsel that he "would have to have somebody to authenticate the transcript."

Given this, we disagree with defense counsel that the issue may be framed as he has done. He sees this issue as the trial court's refusing to allow him to cross-examine Officer Young as to the contents of a "document," this being the transcript of the preliminary hearing, which he intended to offer as an exhibit. In our view, this matter is governed by Tennessee Rule of Evidence 613, which sets out the procedure for utilizing the prior statement of a witness. Rule 613(b) permits, under certain circumstances, extrinsic proof of the statement; and it appears that the trial court was following this procedure by advising counsel he could prove that Officer Young had testified at the preliminary hearing as counsel claimed by requiring that the court reporter testify as to Officer Young's testimony. In response to defense counsel's request that he be allowed to "let the jury know that the transcript" reflected that Officer Young had testified at the preliminary hearing as counsel had represented, the court instructed that he would have to "authenticate the transcript." On appeal, counsel has not provided authority for the proposition that he may bypass Tennessee Rule of Evidence 613(b) and, himself, advise the jury as to preliminary hearing testimony. This issue is without merit.

VII. Sufficiency of the Evidence

The defendant argues that the evidence was insufficient to support his convictions, saying that the "evidence used to convict him was corrupt and incompetent." The State contends that the defendant failed to address the elements of any of the offenses of which he was convicted.

In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Although the defendant argues that he was "not allowed to create exculpatory evidence by way of the intoximeter," this court has held that "a defendant may be convicted of DUI based on either evidence of intoxication or evidence showing that the defendant had a blood-alcohol concentration of .10% or more." State v. Everett D. Robinson, No. W1999-01348-CCA-RE-CD, 2000 WL 364844, at *4 (Tenn. Crim. App. Apr. 7, 2000) (citing Tenn. Code Ann. § 55-10-401(a)). The proof at trial established that Officer Young stopped the defendant as a result of his erratic driving. He detected the odor of alcohol on the defendant's person and found a cold, open container of beer under the driver's seat of the defendant's vehicle. The defendant failed two of the field sobriety tests. When Officers Young and Sulfridge attempted to handcuff him, he resisted and fought with the officers and had to be subdued with pepper spray. While Officer Young was transporting the defendant to jail, the defendant repeatedly spat on Young and threatened to kill him. Accordingly, we conclude that the evidence fully supports the defendant's convictions for DUI, assault, and resisting arrest.

VIII. Cumulative Effect of Errors

The defendant lastly argues that the cumulative effect of the various errors resulted in the denial of his rights to due process and a fair trial. The State counters that the defendant has waived this issue because he failed to include it in his motion for a new trial and failed to include any citations to the appellate record. Since we disagree with the defendant's claim that the trial court committed errors, we conclude that this claim is without merit.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgments of the trial court.

ALAN E. GLENN, JUDGE